



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 22, 1998

Mr. John Riley
Director, Litigation Support Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-0213

Dear Mr. Riley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 111925.

The Texas Natural Resource Conservation Commission (the "commission") received a request for "any and all documentation and records you have regarding the Ridgeway dump site operated by Voluntary Purchasing Groups in Ridgeway, Hopkins County, Texas, including all sample results and tests." You explain that you have provided some of the requested information to the requestor. You claim, however, that the remaining information is excepted from required public disclosure by sections 552.103, 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the sample of documents you have submitted.¹ You have divided the samples into three groups corresponding with the exception you raise for that group of documents.

You first argue that one group of the submitted documents may be withheld under section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We find that some of the information you have submitted reflects attorney legal advice or opinions, and therefore, may be withheld under section 552.107. However, some of the information is purely factual and may not be withheld under this exception. We have marked the information that may be withheld under section 552.107 within this group of documents.

You next argue that a second group of documents may be withheld under section 552.103.² Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that there is currently an enforcement action pending against Voluntary Purchasing Group which may only be resolved through settlement, administrative hearing, or trial. You also state that the commission is a party to VPG's bankruptcy proceeding. We have reviewed the representative documents for which the commission has asserted section 552.103(a) as an exception and conclude that they are related to either the pending enforcement action against VPG or its bankruptcy proceeding. Therefore, the commission may withhold the documents in this group under section 552.103(a). *See* Open Records Letter Nos. 96-1173 (1996), 96-395 (1996). We note, however, that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed, e.g., correspondence from the opposing party, and correspondence sent to the opposing party. In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

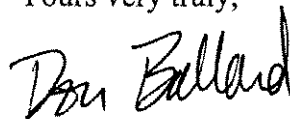
²We also point out that this office recently stated that if a governmental body wishes to withhold attorney work product, the proper exception to raise is either section 552.103 or section 552.111. Open Records Decision No. 647 (1996). We announced in Open Records Decision No. 647 (1996) that a governmental body must show that the work product (1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and (2) consists of or tends to reveal the thought processes of an attorney. *Id.* at 5.

Finally, you argue that a third group of documents may be withheld under section 552.111 of the Government Code. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Furthermore, in Open Records Decision 559 (1990), this office concluded that a preliminary draft of a document that is intended for public release in a final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document and as such could be withheld pursuant to the statutory predecessor to section 552.111. Thus, section 552.111 also excepts draft documents to the extent that the draft documents pertain to the policymaking function of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5.

While some of the information in this third group of documents pertains to the policy functions of the commission and consists of advice, recommendations, and opinions, other information contained in these documents is purely factual. We have marked the information that may be withheld from required public disclosure under section 552.111. The remaining information in this group must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 111925

Enclosures: Marked documents

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(w/o enclosures)